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No. 83-1336

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARY JONES, *et al.*,

Petitioners,

v.

AMALGAMATED WARBASSE HOUSES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT AMALGAMATED WARBASSE HOUSES, INC.

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Amalgamated Warbasse Houses, Inc.

Questions Presented

1. Where a bona fide class action settlement agreement provides only for injunctive relief, is a district court forbidden to review the amount of a fee award contained in that agreement?

2. When a district court finds, and the court of appeals unanimously affirms, that plaintiffs in a class action did not prevail on several of their claims; that plaintiffs' three separate law firms may have unnecessarily duplicated their efforts; that the tasks counsel performed were less complex than in other cases where comparable fees had been awarded; and that counsel had failed to submit contemporaneous time records, did the court abuse its discretion by awarding "only" an average of $75 per hour to each attorney for every hour claimed?

CONTENTS

Page

Questions Presented i

Contents ii

Authorities Cited iv

Rule 28.1 Statement vi

Statement of the Case 2

Summary of Argument..... 7

Reasons for Denying the Writ..... 12

I. The District Court Had a Duty to Review The Award of Attorneys' Fees 12

II. There Is No Danger That The Decision Below Will Encourage Litigation Or Discourage Attorneys From Accepting Cases 16

III. Neither The Decision Below Nor The Record Supports Any Claim That The Court Reduced The Fees Sought Because This Is A Civil Rights Case. 18

CONTENTS

		Page
IV.	The Courts Below Applied The Proper Standards In Determining Plaintiffs' Attorneys' Fees	21
V.	Petitioners' Failure To Maintain Adequate Time Records Provides An Independent Ground For Affirmance...	23
Conclusion		25

AUTHORITIES CITED

Cases:

Page

Blum v. Stenson, S.Ct. Dkt. No. 81-1374.....11, 18-19,

City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974)..... 15

Cleary v. Blum, 507 F.Supp 514 (S.D. N.Y. 1981)..... 22

Foster v. Boise-Cascade, Inc., 557 F.2d 335 (5th Cir. 1978), aff'g 420 F. Supp. 674 (S.D.Tex. 1976)..... 13

Gagne v. Maher, 594 F.2d 336 (2d Cir. 1979), aff'd, 448 U.S. 122 (1980).. 10, 13

Hensley v. Eckerhart, ___ U.S. ____, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)..... 3, 9-10, 13, 23-25

Kow v. New York City Housing Authority, 539 F.Supp 708 (S.D.N.Y. 1982)..... 21

Levin v. Mississippi River Corp., 377 F. Supp 926 (S.D.N.Y.), aff'd, 508 F.2d 836 (2d Cir. 1974), cert. denied, 429 U.S. 833 (1976)..... 13, 15

Malchman v. Davis, 706 F.2d 426 (2d Cir. 1983)..... 12, 15

McCann v. Coughlin, 698 F.2d 112 (2d Cir. 1983)..... 24

AUTHORITIES CITED

Cases:

Page

Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978)..... 25

Piambino v. Bailey, 610 F.2d 1306 (5th Cir.), cert. denied, 449 U.S. 1011 (1980)..... 12, 15

Sharrock v. Harris, 489 F. Supp 913 (S.D.N.Y. 1980)..... 22

Thomas v. Board of Education, 505 F. Supp. 102 (N.D.N.Y. 1981)..... 22

Wheatley v. Ford, 679 F.2d 1037 (2d Cir. 1982)..... 13

Other Authorities:

3B J. Moore, Federal Practice, ¶ 23.91 (1983-84 Cum. Supp.)..... 13

RULE 28.1 STATEMENT

Amalgamated Warbasse Houses, Inc. has no parent company, subsidiaries or affiliates.

No. 83-1336

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

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MARY JONES, et al.,

Petitioners,

v.

AMALGAMATED WARBASSE HOUSES, INC., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Amalgamated Warbasse Houses, Inc., a publicly-supported housing cooperative for limited-income residents, respectfully requests that this Court deny the petition for a writ of certiorari, in which plaintiffs' attorneys seek to increase their fee award by approximately $16,000.

Statement of the Case

Petitioners claim that the Court of Appeals for the Second Circuit (per Feinberg, Ch. J.), erred in its unanimous affirmance of the District Court's ruling reducing their attorneys' fees by $15,750.

The rather unusual history of this case illustrates the wisdom of according the trial court discretion to determine an appropriate fee for attorneys in class action settlements, and the absence of any issue warranting this Court's attention.

Plaintiffs commenced this action in February 1981 by a complaint that alleged, in essence, that the methods used by respondent Amalgamated Warbasse Houses, Inc. ("Warbasse") to fill its vacant cooperative apartments discriminated against minorities. From March 1981 until October 1982 (when the parties submitted a proposed settlement for the court's approval), no issues were litigated. There were no depositions, no discovery, no briefs,

no hearings, and, of course, no trial. This action was ultimately resolved simply through negotiation.

As is common, the parties differ on the extent of their relative success. It cannot be denied, however, that plaintiffs achieved "only partial or limited success" Hensley v. Eckerhart, ___ U.S. ___, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40, 52 (1983). Their complaint sought: (1) class certification; (2) a declaration that defendants' actions were discriminatory; (3) a permanent injunction against future discrimination; (4) a preliminary injunction against use of a waiting list created in 1981; (5) an injunction against use of a children's waiting list; (6) an injunction requiring the New York State Division of Housing and Community Renewal to oversee compliance with any remedial plan; (7) compensatory damages; (8) exemplary damages; and (9) an immediate trial. (A. 15-16).* Of

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* "A. ___" refers to the Joint Appendix filed

those nine items, plaintiffs obtained only item 1 (class certification) and, arguably, item 6 (Division supervision, which was already required by State regulation). In addition, they obtained modification of some apartment waiting lists, by interspersing minority applicants to fill eight per cent of available apartments over an eight-year period -- but the waiting lists they sought to abolish remain in use, and everyone on them before the action began remains on them.

In October 1982, the parties submitted to the District Court a proposed order and judgment to dispose of this case, which included a provision for attorneys' fees. While defendants submitted memoranda in support of the settlement, plaintiffs submitted nothing (A. 98).* When the District Court specifically

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* On the issue of attorneys' fees, Warbasse's brief stated, "Warbasse has disputed plaintiffs' entitlement to the payment of fees in this amount, [but] we recognize that continued litigation of this issue would make little economic sense." (A. 98). Plaintiffs, by an unsuccessful motion to amend the judgment, an unsuccessful appeal, and now a petition for certiorari, have since forced litigation of this $15,750 issue upon us.

asked counsel for some factual support for their fee application, only one of plaintiffs' three law firms complied, submitting a four-page affidavit. (A. 52-55). The only indication of the time counsel had spent on this case was the following two sentences:

> "As of the date of this affidavit, counsel have expended 321 hours in the prosecution of this litigation. Of these total hours, 241 were spent by Richard F. Bellman, 60 by Lawrence Grosberg and 20 by Karen Freeman." (A. 53).

Counsel supplied no contemporaneous time records, and made no attempt to describe the amount of time they had spent on each task.

Based on that submission, the District Court, recognizing its independent responsibility to see that a fee award is reasonable, reduced counsels' request by slightly more than one-third. (36a-43a).*

Only after the District Court's decision did plaintiffs submit -- on a motion to amend the judgment -- anything even resembling the

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* "___a" refers to the appendix to petitioners' brief.

kind of support required to justify a request for fees. Having thus led the District Court into what they now claim was error, plaintiffs' three firms then submitted four additional affidavits. (A. 75-96). Everything in their belated submission could have been provided to the court earlier, but plaintiffs chose not to provide it. Even then, two of plaintiffs' firms still submitted nothing in support of their claim for $10,320 for eighty hours of work, except to state their experience as lawyers. (A. 91-96, 99). Only after defendants' response pointed out the inadequacy of those submissions (A. 99) did plaintiffs' attorneys prepare three more affidavits, describing in summary fashion what they had done in this case (A. 106-13) -- thus bringing to a total of eight the affidavits they submitted to show that their work had been done without waste or duplication.

After reviewing these additional affidavits, the District Court awarded no further fees. Its opinion specifically noted

that plaintiffs did not "win"; that the risk and difficulty of the litigation were not unusually great; that counsels' time records had failed to demonstrate the absence of duplication; and that, in light of all the circumstances, it had awarded a reasonable average fee for all plaintiffs' attorneys' work, from the most routine to the most challenging. (51a-58a, 61a,n.6).

In an opinion noting the care taken by the District Court, 721 F.2d 881, 885 (2d Cir. 1983), (15a), the Court of Appeals (per Feinberg, Ch.J., and Lumbard and Newman, C.JJ.) disposed of plaintiffs' arguments without difficulty and held that the District Court had properly exercised its discretion.

Summary of Argument

Nothing in the idiosyncratic facts of this case or the unexceptionable principles of law unanimously applied below warrants the time or attention of this Court. Reduced to its essence, plaintiffs' attorneys' grievance is

simply that the courts below awarded them fees averaging "only" $75 per hour* for every hour claimed, rather than the nearly $130 per hour they sought. The total amount at issue is less than $16,000. Nor were any important legal principles involved, except the familiar one that a trial court may -- indeed must -- review all aspects of a proposed class settlement, including any fee agreement.

Under the unique facts of this case, plaintiffs' attorneys cannot claim they were short-changed by being awarded an average of "only" $75 per hour. Plaintiffs obtained only a fraction of the relief they sought. This case involved no depositions, no hearing, no trial, and (except for this continued

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* As the District Court recognized, counsels' estimate of the post-judgment labor required in this case was a generous one. If counsel were required to expend little or no additional effort on the case, the sum awarded to plaintiff's lead counsel would amount to an average hourly rate of $83.50. (60a,n.5).

litigation of the fee issue) no appeals. Plaintiffs were represented throughout by three separate attorneys, two of whom never spoke a word in court, but all of whom sought and were awarded substantial fees for every hour of work performed -- whether for proofreading, conferring or sitting mute in the courtroom gallery, and whether the work was suitable for partners, associates, paralegals or secretaries. Under such circumstances, an award of $26,000 in fees is scarcely an injustice calling out for correction by this Court.

Moreover, counsels' failure to provide contemporaneous time records provides an independent reason why certiorari should be denied. This Court restated just last term:

> [W]e would not view with sympathy any claim that the district court abused its discretion in awarding unreasonably low attorney's fees in a suit in which plaintiffs were only partially successful if counsel's records do not provide a proper basis for determining how much time was spent on particular claims.

Hensley v. Eckerhart, __ U.S. __, 103 S.Ct. 1933, 1941 n.12, 76 L.Ed.2d 40, 53 n.12 (1983). That statement precisely describes this case. Plaintiffs' counsel have felt it appropriate to burden this Court, the Court of Appeals, and the District Court with an application for $15,750 in additional fees. In an area where judicial discretion is broad, see Hensley v. Eckerhart, supra; Gagne v. Maher, 448 U.S. 122 (1980), aff'g 594 F.2d 336, 344 (2d Cir. 1979), and where Chief Judge Feinberg of the Court of Appeals wrote that "the district court carefully considered the many factors relevant to a decision whether to accept or reject a fee settlement and set out its reasons for rejecting the fees agreed upon and for making a reduction," 721 F.2d at 885, (15a), there is no ground for issuing the writ.

None of the arguments raised by petitioners warrants a grant of certiorari. There is no conflict in the authority for the settled rule that courts may review all aspects

of a class action settlement, including a fee award. There is no danger that the court's exercise of its discretion in this case will encourage litigation or discourage litigators; and there is no basis for any contention that the District Court applied improper considerations or standards below. There is emphatically no Blum v. Stenson issue presented in this case, since the court below made clear that its award was based solely on the quality of the work done and the degree of petitioners' success.

For all these reasons, the writ should be denied.

REASONS FOR DENYING THE WRIT

I. The District Court Had a Duty To Review The Award of Attorneys' Fees

The Court of Appeals squarely addressed, and rejected, petitioners' argument that a District Court is forbidden to review the amount of a fee award contained in an arms-length negotiated class action settlement agreement.* 721 F.2d at 884, (10a). Neither petitioners' brief below nor their petition here could cite a single case to the contrary.

The law, amply cited by the Court of Appeals, squarely supports the District Court's power to review such fee agreements. E.g., Malchman v. Davis, 706 F.2d 426, 435-36 (2d Cir. 1983); Piambino v. Bailey, 610 F.2d 1306,

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* Though petitioners disclaim arguing that the court should be a "rubber stamp," they contend that, at least where the settlement is "not collusive" and defendants (rather than the class) have to foot the bill, "a district court should approve the fees in the amount agreed," (Petitioners' brief at 19) apparently as a matter of law. This is a "rubber stamp" in all but name.

1328 (5th Cir.), cert. denied, 448 U.S. 1011 (1980); Foster v. Boise-Cascade, Inc., 577 F.2d 335, 336 (5th Cir. 1978), aff'g 420 F.Supp. 674 (S.D.Tex. 1976); Levin v. Mississippi River Corp., 377 F.Supp. 926, 930-31 (S.D.N.Y.), aff'd, 508 F.2d 836 (2d Cir.1974), cert. denied, 429 U.S. 833 (1976); 3B J.Moore, Federal Practice, ¶23.91 at p. 142 (1983-84 Cum. Supp.)

This principle is not in dispute and requires no further restatement by this Court. Just last term this Court stressed the District Court's discretion to determine the reasonableness of fee awards:

> We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.

Hensley v. Eckerhart, supra, 103 S.Ct. at 1941, 76 L.Ed.2d at 53. See also, Wheatley v. Ford, 679 F.2d 1037, 1040 (2d Cir. 1982); Gagne v.

Maher, 594 F.2d 336, 344 (2d Cir. 1979), aff'd, 448 U.S. 122 (1980).

As the Court of Appeals emphasized below, "The [District Court's] perspective and obligations are different from those of the parties. . . .

> The court has a special responsibility to supervise the matter of attorneys' fees in class actions and in any litigation involving a fee-shifting statute like section 1988. Even in a case such as this, where any decrease in the amount of the fees will not inure to the benefit of the plaintiff class, which received only injunctive relief, the court's downward revision of a fee settlement unacceptable to the court will promote confidence in the integrity of the judicial process and is a proper exercise of authority over officers of the court in litigation pending before the court.

721 F.2d at 884-85, (11a, 14a-15a).

Not only is it not error for a court to review the amount of fees awarded, it is error not to do so, even when the parties submit a proposed agreement. As Judge Weinfeld has stated,

> [T]o accept as conclusive the parties' agreement as to fees in a class or derivative action would mean the surrender

> of the court's duty and its discretion. The agreement, while it may have some relevance, does not relieve the court of its duty to make an independent appraisal, to "avoid awarding 'windfall fees' and . . . likewise avoid every appearance of having done so," and to award only such fees that are fair, "with an eye to moderation" based upon the applicable standards.

Levin v. Mississippi River Corp., 377 F.Supp. 926, 931 (S.D.N.Y.), aff'd, 508 F.2d 836 (2d Cir. 1974), cert. denied, 429 U.S. 833 (1976), quoting City of Detroit v. Grinnell Corp., 495 F.2d 448, 469-70 (2d Cir. 1974).

This principle is not in dispute, except by petitioners. A court must examine every aspect of a class action settlement, even if the parties have negotiated at arms' length and in good faith. Malchman v. Davis, 706 F.2d 426, 435-36 (2d Cir. 1983); Piambino v. Bailey, 610 F.2d 1306, 1328 (5th Cir.), cert. denied, 448 U.S. 1011 (1980). As every Court that has considered the matter has concluded, the parties may not and can not relieve the District Court of its duty to review even a negotiated fee award.

II. There Is No Danger That The Decision Below Will Encourage Litigation Or Discourage Attorneys From Accepting Cases

Petitioners assert that the traditional power of courts to review class action fee agreements -- and adjust them if they are unreasonable under the facts of a particular case -- will encourage litigation and discourage litigators. We may justifiably expect, however, that the plaintiffs' bar will not be deterred from taking cases by the fear that the courts will not award them unreasonable fees.

Permitting courts to review settlement agreements, and thus necessarily permitting them to reject or modify some of them, is nothing new to the law. Courts have routinely exercised their duty to review, and their discretion to adjust, the fees awarded in class action settlements, without the dire effects petitioners fear.

Petitioners argue that, unless the courts are stripped of this traditional power to review fee settlements, counsel will have no incentive to agree on fees. The same might be said regarding the review of any term of a settlement agreement. But petitioners' veiled threat to litigate all fee disputes, in addition to disregarding their obligations as officers of the court, overlooks the very substantial benefits they obtain by settling: reducing litigation costs, hastening settlements, and, not least, causing defendants to refrain from challenging the agreed award when it is presented to the reviewing court. Moreover, like any other aspect of a settlement, a fee agreement is afforded a presumption of regularity. If the agreed fee is at all reasonable in light of the facts of the particular case -- as it here was not -- there is every reason to assume that the court

will accept it.* These benefits will remain, and will adequately encourage settlement, regardless of whether the trial court retains its right to review the settlement agreement.

Finally, of course, allowing the trial court to make sure that fees are "reasonable" should not fatally discourage counsel. The courts' discretion, and the presumption of regularity afforded settlement agreements will adequately protect those attorneys from hardship. They have no right to expect their fees to be "unreasonable".

III. Neither The Decision Below Nor The Record Supports Any Claim That The Court Reduced The Fees Sought Because This Is A Civil Rights Case

Seizing on the pendency of Blum v. Stenson, S.Ct. Dkt. No. 81-1374 in this Court,

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* Indeed, the Second Circuit, in the very opinion petitioners now assail, reaffirmed that such an agreement should be given great weight by the reviewing court, 721 F.2d at 885, (13a-14a).

petitioners raise for the first time the argument that the District Court reduced the fees here because this is a civil rights case. They made no such argument below, nor did they even cite Stenson to the Court of Appeals.

Petitioners' effort to shoehorn a Stenson issue into this case must fail, because nothing in this case raises any such issue.

The important issues in Stenson are straightforward: whether fees awarded to non-profit firms should be reduced because of their relatively low overhead; and whether a bonus for the "contingent" nature of a claim is proper. Those issues are not present here.

Here the District Court made clear its reasons for reducing the fee sought: lack of success on several claims; inadequate time records; possible duplication of effort; and work whose complexity and difficulty were far less than in cases where comparable fees had been awarded. There is no suggestion in the opinions below that counsels' fee was reduced

because this was a civil rights case, and the District Court specifically refuted petitioners' claim that it had reduced the fee because public funds were involved. (58a). The Court of Appeals, like the District Court, was well aware that "rates awarded to civil rights counsel should ordinarily be on par with market rates for private attorneys engaged in other complex federal litigation," 721 F.2d at 885, (17a). It held that the District Court properly examined the hourly rates awarded in comparable recent cases.

Thus, nothing in either the District Court's "carefully considered" opinion, 721 F.2d at 885, (15a), or the Court of Appeals' affirmance of it, raises the second question purportedly presented by the petition.

IV. The Courts Below Applied The Proper Standards In Determining Plaintiffs' Attorneys' Fee

The argument of would-be amici* that the courts below applied incorrect standards in reviewing the fee sought is without substance.

To be sure, some courts have awarded very high hourly rates in some civil rights cases, as in other cases, where the nature of the work actually performed -- complicated motion practice, discovery, trial work, etc. -- justified the award. Here, those factors are lacking. Moreover, as the courts below noted (17a, 51a-53a) an average fee of $75.00** per hour (for all hours by every attorney) is well within the range of fees awarded in similar cases in New York. E.g., Kow v. New York City

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* Respondent Warbasse denied a Rule 36 request for leave to file an amicus brief, for the reasons set forth in correspondence annexed to this brief.

** Or $83.50, see footnote, p. 8, supra.

Housing Authority, 539 F.Supp. 708, 710 (S.D.N.Y. 1982) (awarding fees of $75 per hour); Cleary v. Blum, 507 F.Supp. 514, 518 (S.D.N.Y. 1981) (awarding $75 per hour to attorney with 11 years experience, less to others); Thomas v. Board of Education, 505 F.Supp. 102, 104-05 (N.D.N.Y. 1981) (awarding fees of $50 per hour to ACLU specialist, less to another); Sharrock v. Harris 489 F.Supp. 913, 916 (S.D.N.Y. 1980) (awarding $75 per hour to attorneys with 16 and 12 years experience, less to another).

Nor is it correct that the District Court reduced the fees sought because of the involvement of taxpayer funds. The District Court carefully explained (58a), and the Court of Appeals found no reason to doubt, that this fact "was not a reason for the reduction." (16a).

Finally, despite amici's objection to the lower courts' considering that petitioners did not completely "win" below, this Court held

only last term in Hensley v. Eckerhart that the degree of a party's success must be taken into account in setting fees:

> If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation on the whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims are interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

103 S.Ct. at 1941, 76 L.Ed.2d at 52.

V. Petitioners' Failure To Maintain Adequate Time Records Provides An Independent Ground For Affirmance

A grant of certiorari would be particularly inappropriate in this case, where there exists an independent ground for affirmance: plaintiffs' attorneys' failure to keep or provide adequate time records.

This Court and the Court of Appeals for the Second Circuit have made amply clear to

attorneys seeking fee awards that their applications must be supported by adequate records of each attorney seeking fees. Hensley v. Eckerhart, ___ U.S. ___, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40, 50 (1983), McCann v. Coughlin, 698 F.2d 112, 131 (2d Cir. 1983) and cases cited therein.

Petitioners here never provided any contemporaneous time records. Even after the District Court requested time information, counsel at first supplied no information on how their time had been spent. Only on their motion to amend the judgment, after the Court reduced the fees they sought, did they even supply post facto summary breakdowns of their time into a few general categories: "initial work," "settlement," "liaison," etc. (A. 89, 110-11, 112-113). While petitioners' three law firms claim all their work was necessary and non-duplicative, they failed to provide the District Court with information to support that claim. (61a).

Petitioners' failure to supply detailed time records by itself precludes any complaint than the court awarded them less than they deserved. Hensley v. Eckerhart, ___ U.S. ___, 103 S.Ct. 1933, 1941 n.12, 76 L.Ed.2d 40, 53 n.12 (1983), quoting Nadeau v. Helgemoe, 581 F.2d 275, 279 (1st Cir. 1978). "Where the documentation of hours is inadequate the district court may reduce the award accordingly." Hensley, supra, 103 S.Ct. at 1939, 76 L.Ed.2d at 50.*

Conclusion

Because this case rests on unique facts; because the District Court's discretion to

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* No purpose would be served by remanding this application for further consideration or findings of fact. Petitioners' attorneys have had several opportunities to present more detailed records, and failed to do so. Moreover, in a case like this, where the total amount in controversy is less than $16,000, a remand for further proceedings would disproportionately burden the parties and the courts.

review fee awards is broad and undisputed; because the decision below is not in conflict with any other decision; because this Court last term held it would not view claims like petitioners' with sympathy; because the case has been rightly decided; because there are independent grounds for affirmance; because the argument that the court below reduced the fee award because this is a civil rights case is a sham; because this case raises no issue that is not covered by this Court's prior decisions; because the amount at issue is very small; and because further litigation of this issue would unfairly burden the parties and the courts, the petition should be denied.

Respectfully submitted,

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John M. Devlin
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Of Counsel

March 14, 1984

APPENDIX

LDF Legal Defense Fund

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
99 Hudson Street, New York, N.Y. 10013• (212) 219-1900

February 15, 1984

Ronald W. Meister, Esq.
Kornstein Meister & Veisz
405 Lexington Avenue
New York, N.Y. 10174

Re: Jones v. Amalgamated Warbasse Houses, Inc.

Dear Mr. Meister:

This letter is to request your consent, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, to the filing of an amicus curiae brief by the NAACP Legal Defense and Educational Fund, Inc., and the American Civil Liberties Union in support of the petition for a writ of certiorari in the above case.

Thank you very much.

Very truly yours,

Charles S. Ralston

Charles Stephen Ralston

CSR/gj

Contributions are deductible for U.S. income tax purposes

The NAACP LEGAL DEFENSE & EDUCATIONAL FUND is not part of the National Association for the Advancement of Colored People although it was founded by it and shares its commitment to equal rights. LDF has had for over 25 years a separate Board, program, staff, office and budget.

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February 21, 1984

Charles Stephen Ralston, Esq.
NAACP Legal Defense and Educational
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99 Hudson Street
New York, New York 10013

Jones v. Amalgamated Warbasse Houses, Inc.

Dear Mr. Ralston:

While I consider it difficult to deny any request of the Legal Defense Fund, whom I have represented in several pro bono matters, I do not consent to the request made in your February 15 letter regarding Jones v. Warbasse. As Chief Judge Feinberg's opinion makes clear, the decision plaintiffs seek to reverse was well within the District Court's discretion, in an area where the trial court's discretion is very broad. All the factors considered by the District Court were properly considered, including the nature of the services provided and plaintiffs' relative lack of success. Moreover, plaintiffs' attempt to manufacture an issue under Blum v. Stenson makes no sense, since neither the District Court nor the Court of Appeals made the slightest suggestion that the fees here were reduced because this was a civil rights case.

While one might sympathize with the Fund's desire to obtain higher fees for counsel in civil rights cases, this is certainly not the case to raise that issue -- for several reasons, including the idiosyncratic facts, the small amount involved and counsel's inadequate time records. See Hensley v. Eckerhart, - U.S. - , 76 L.Ed.2d 40 (1983).

Sincerely,

Ronald W. Meister

Ronald W. Meister

RWM/r

cc: Melvyn R. Leventhal, Esq.
James M. Nabrit III, Esq.